

***United States Court of Appeals
for the Second Circuit***



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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1690

CHARLES A. SCHICKE, ET AL.,
Appellants,

v.

JAMES T. LYNN, Secretary of Housing
and Urban Development,
GEORGE ROMNEY, and THE CITY OF NORWALK,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE FEDERAL APPELLEES

ISSUE PRESENTED

Whether the district court properly granted summary judgment where no genuine factual issue existed that HUD's decision approving the conversion of parkland in Norwalk, Connecticut, for use as the site of a community college was consistent with the City's comprehensive plan under 42 U.S.C. 1500c.

STATEMENT OF THE CASE

1. Nature of the Case.

Appellants own and reside on property that is in close proximity to 43 acres of parkland in Norwalk,

Connecticut. They seek a declaration that the HUD Secretary's approval of the conversion of that acreage originally acquired by the City of Norwalk as parkland under the Open-Space Land Program, 42 U.S.C. 1500, to use as the site for Norwalk Community College was illegal. They also seek to enjoin the Secretary from approving the conversion of an additional 14 acres of parkland for use as the Community College site, and seek to enjoin the City of Norwalk from constructing the Community College on the land in issue. The district court granted summary judgment upholding the Secretary's determination. Schicke v. United States, 346 F. Supp. 417 (D. Conn. 1972). On appeal, this Court held that the administrative record before the Secretary was deficient at the time he made his determination since it did not establish that the conversion was in accord with the City of Norwalk's then applicable comprehensive plan for the area. Schicke v. Romney, 474 F. 2d 309 (C.A. 2, 1973). On remand, and after discovery, the district court again entered summary judgment for the Secretary and the City of Norwalk (Add. 1a-11a).^{1/} This appeal followed.

^{1/} Since no appendix has been filed, we have reproduced the district court's opinion of March 26, 1974, in an addendum to this brief, infra pp.1a-11a.

2. Statement of the Facts.

The facts and statutory scheme are fully set out in this Court's opinion of February 20, 1973. Schicke v. Romney, 474 F. 2d 309, 311-313 (C.A. 2, 1973). Insofar as is pertinent to this appeal, this Court on the first appeal held that in order to fulfill the statutory obligation of 42 U.S.C. 1500c, it was incumbent upon "the Secretary or members of his department to have inspected, and be thoroughly familiar with, the contents of whatever documents comprise the locality's comprehensive plan". Id. at 316. The Court noted that as it then stood, the record "leaves in doubt whether the regional staff itself ever saw anything in the nature of a comprehensive plan or whether they merely relied on statements by local officials". Id. at 317. Accordingly, this Court remanded to the district court "for further proceedings * * * to ascertain the basis of the Secretary's action with reference to any comprehensive plan". Id. at 317.

On remand both the Government and appellants moved for summary judgment. The Government submitted two affidavits of Bernard I. Levine, HUD's Regional Assistant Director of Planning, New York Regional Office (Doc.^{2/} 61, 65, Exhibits A-D, I-III). ^{3/} The affidavits and attached exhibits explained the comprehensive planning requirements

^{2/} The reference "Doc. ____" is to the document number of the record on appeal.

^{3/} HUD's Answers to Interrogatories were also filed on behalf of the Secretary (Doc. 64).

which HUD imposes on proposals for conversion of open-space land, and detailed the investigation which was undertaken to determine whether the City of Norwalk's proposal was in accordance with its comprehensive plan.

As the affidavits detailed (Levine Affidavit, paragraphs 3 and 4 and Exhibit A, Open-Space Letter No. OS-12), and the district court found (Add. 3a):

[a] comprehensive plan contained in a single document, so entitled, which could be reviewed and approved once, is not required by the Department as a prerequisite either for new applications for open-space grant assistance or for the later conversion of any part of such acquired property. Rather, the requirement that a program of area-wide comprehensive planning be underway in the urban area in which the property is located contemplates a continuing process of action undertaken by the municipality to regulate and manage land uses consistent with the acquisition and development of open space needs in the entire area.

The investigation HUD conducted of the City of Norwalk's proposal was a thorough one. The district court found that "[s]ince this was the first major request for a conversion presented to HUD, the application was given special consideration" (Add. 4a). In summary, the investigation was as follows:

After the City in the fall of 1967 submitted its application ^{4/} for open-space assistance to purchase the Taylor Farm, Mr. Levine and Mr. William Davis, Assistant Regional Administrator for Metropolitan Development,

^{4/} The application contained a location map labelled "Master Plan of Parks". See Exhibit D to Levine Affidavit.

travelled to Norwalk to conduct a preliminary review of the proposal. They met with City officials including Norwalk's mayor to determine the purposes of the proposal and to evaluate it in terms of the needs and goals of the community. The HUD officials inspected the sites to determine their desirability for open-space purposes and to assess the impact of the conversion on the remaining portion of the Gallaher Estate. They also toured the area to determine the proximity of the sites to areas of high density population, relative accessibility, and existence of complementary adjoining land uses (Levine Affidavit, paragraph 5).

In order to determine whether the proposed conversion-substitution was consistent with the local comprehensive planning activities of the City, Mr. Levine, together with Mr. Constantine Vlatos, a Regional Office urban planner, reviewed copies of planning documents on file in the Regional Office, including "A Review of Park Planning 1952 - 1966" (Exhibit C to Levine Affidavit), the Proposed Master Plan Development for Norwalk (Exhibit D to Levine Affidavit), the Master Plan of Transportation (Exhibit I to Levine Affidavit), and the Capital Budget of the City of Norwalk 1967-1968 (Exhibit II to Levine Affidavit) (Levine Affidavit, paragraph 6; Levine Supplemental Affidavit, paragraphs 3 and 4). They noted that the City's Planning Commission had incorporated the conversion into its Master Plan of Parks (Levine Affidavit,

paragraph 8; Levine Supplemental Affidavit, paragraph 4; see Exhibit D to Levine Affidavit).

Thereafter, in order to expand and update their familiarity with the local planning program, Messrs. Levine and Vlatos again travelled to Norwalk on April 7, 1969. They met with Mr. Joseph Tamsky, Director of the Norwalk City Planning Commission, and reviewed with him the City's open-space program and the goals of the local and areawide comprehensive plans. A detailed review was made of the City's Master Plan of Parks and Land Use Plan (Levine Affidavit, paragraph 7).

Mr. Levine then met with other HUD officials to debate the merits of the conversion. No final staff decision was reached. It was decided that HUD would require the City to obtain formal approval from the South Western Regional Agency that the conversion was consistent with applicable comprehensive plans. It was also decided that the HUD staff would prepare a conversion "package" for the Secretary containing a report from the Regional Office staff, supporting documentation, and recommendations suitable for the Secretary's consideration (Levine Affidavit, paragraph 9). On June 4, 1969, the South Western Regional Agency gave its concurrence (Doc. 11). The staff then transmitted its conversion package to the Secretary.

At the time the Secretary made his January 11, 1972 Determination (Doc. 39), the conversion package before him included the following documents which bore upon the amenability of the conversion to Norwalk's comprehensive plan: (1) the January 22, 1968 letter from the Mayor of Norwalk

requesting approval of the conversion application; (2) the Batstone Memorandum of January 6, 1969 drafted by Mr. Levine; (3) the South Western Regional Agency's June 4, 1969 endorsement of the conversion; and (4) the Davis Memorandum of June 27, 1969 (Doc. 11).

The Mayor's letter indicated that the conversion would be in accord with the City's Master Plan of Parks which promoted the location of schools adjacent to open-space land. It also noted that the Taylor Farm would be more useful as a park than the 57 acres of the Gallaher Estate because "of its potential service to a greater number of people". The main portion of the Gallaher Estate, which included lawns, flower gardens, apple orchards, a vineyard, and walks in wooded areas, would not be impaired by the conversion, Mayor Zullo stated. The Batstone Memorandum also noted that "the conversion is in accord with the development policies which are part of the City's Comprehensive Plan". The South Western Regional Planning Agency, in endorsing the conversion, stated that:

3. The substituted property may improve the open-space program of the City because it is close to higher density residential areas than the converted property, and is more accessible to low and moderate income families.
4. The proposed conversion-substitution will not adversely affect the regional open-space program.

And the Davis Memorandum recommended approval of the proposed substitution as well:

The Regional Office recognizes that this is the first major conversion request to be decided by the Secretary and careful guidelines must be established to prevent wholesale conversion requests which would have a deleterious effect on the Open Space Land Program. It is our opinion, however, that this request is a meritorious one which would benefit both the City and HUD. In addition to providing the City of Norwalk with a most attractive site for a community college, it will make available additional open space and passive recreational opportunities for low income and minority group residents.

Mr. Davis also noted that the conversion was supported by the Governor of Connecticut and various concerned state agencies including the Board for Regional Community Colleges, the Commission for Higher Education, and the Department of Agriculture and Natural Resources (Doc. 11).

It was in reliance upon these documents in the administrative record that the Secretary approved the conversion. Finally it was Mr. Levine's view, as detailed in paragraph 8 of his affidavit, that:

the conversion was consistent with what I understood to be three fundamental goals of the areawide plan: (1) to provide open space close to older, high-density neighborhoods; (2) to develop public beach facilities for the region; and (3) to preserve large areas of open space north of the Merritt Parkway. The in-migration of minority families into the South Western Regional Planning area and the scarcity of open space land in the older areas of the cities contributed to making the Taylor Farm an ideal site. The addition of beach front back-up areas would permit the Norwalk beach parks to serve the regional demand for such parks. Finally, the remaining

portion of the Gallaher Estate was large enough to support the passive and active recreation uses which regional planners sought to preserve in the area north of the Merritt Parkway.

On March 26, 1974, Judge Blumenfeld granted HUD's motion for summary judgment (Doc. 74), ^{5/} holding that Mr. Levine's affidavits and the attached exhibits demonstrated that "members of HUD made a detailed study of all the factors relevant to a consideration of whether the proposed conversion would be in accord with a comprehensive plan" and resolved "adversely to plaintiffs all doubts 'whether the regional staff itself ever saw anything in the nature of a comprehensive plan or whether they merely relied on statements by local officials.'" (Add. 9a-10a). See Schicke v. Romney, supra, 474 F. 2d at 317. Consequently, the court held that "there was ample basis for the determination of the Secretary that Norwalk did have a 'comprehensive plan' and that the 'package' which was in the record before him adequately disclosed it" (Add. 9a). This appeal followed (Doc. 75).

STATUTE INVOLVED

At the time of the Secretary's decision on November 10, 1969, Section 704 of the Housing Act of 1961 as amended, 42 U.S.C. 1500c (1964 ed., Supp. III), provided:

^{5/} The district court did not, therefore, rule on plaintiffs' motions compelling the attendance of Secretary Romney for deposition (Doc. 71) and for a stay of the proceedings pending the taking of that deposition (Doc. 72).

No open-space land for the acquisition of which a grant has been made under this chapter shall, without the approval of the Secretary, be converted to uses other than those originally approved by him. The Secretary shall approve no conversion of land from open-space use unless he finds that such conversion is essential to the orderly development and growth of the urban area involved and is in accord with the then applicable comprehensive plan, meeting criteria established by him. The Secretary shall approve any such conversion only upon such conditions as he deems necessary to assure the substitution of other open-space land of at least equal fair market value and of as nearly as feasible equivalent usefulness and location. 6/

ARGUMENT

Introduction and Summary.

This litigation involves the first major request to convert open-space land to a different use pursuant to 42 U.S.C. 1500c. On the first appeal, this Court upheld the Secretary's decision in all respects except

6/ As amended in 1970 by 84 Stat. 1782, this section now provides:

No open-space land for the acquisition of which a grant has been made under section 1500a of this title shall be converted to uses not originally approved by the Secretary without his prior approval. Prior approval will be granted only upon satisfactory compliance with regulations established by the Secretary. Such regulations shall require findings that (1) there is adequate assurance of the substitution of other open-space land of as nearly as feasible equivalent usefulness, location, and fair market value at the time of the conversion; (2) the conversion and substitution are needed for orderly growth and development; and (3) the proposed uses of the converted and substituted land are in accord with the then applicable comprehensive plan for the urban area, meeting criteria established by the Secretary.

one, finding the administrative record deficient only to the extent that it failed to show "that the Secretary /had/ followed the mandate of the statute /42 U.S.C. 1500c/ in certifying that the conversion-substitution involved here was consistent with any comprehensive plan which the City might have had". Schicke v. Romney, supra, 474 F. 2d at 315. Accordingly, the Court remanded for the district court to "determine whether the Secretary has complied with the statutory mandate of §1500c with respect to the local comprehensive plan" (Id. at 319), defining the scope of that inquiry to whether "the Secretary or members of his department have inspected, and /were/ thoroughly familiar with, the contents of whatever documents comprise the locality's comprehensive plan". Id. at 316. On remand, on the basis of the Levine affidavits, the district court again entered summary judgment for the defendants.

We show below that the affidavits and the answers to interrogatories (Doc. 64) conclusively demonstrate that "the Secretary or members of his department have inspected, and /were/ thoroughly familiar with, the contents of * * * the locality's comprehensive plan" prior to the approval of the City's application. Schicke v. Romney, supra, 474 F. 2d at 316.

THE DISTRICT COURT CORRECTLY
GRANTED THE SECRETARY'S MOTION
FOR SUMMARY JUDGMENT.

Appellants main argument is that material issues of fact exist which preclude summary judgment (Appellants' Brief at 9-17). ^{7/} But appellants themselves moved for summary judgment below, and the facts summarized earlier demonstrate that there are no genuine issues of fact as to the legality of the Secretary's decision.

On the first appeal, this Court remanded to the district court to determine whether the City had a comprehensive plan meeting the requirements of 42 U.S.C. 1500c and whether "the Secretary or members of his department" made a detailed study of that plan before approving the conversion-substitution application at issue here. Schicke v. Romney, supra, 474 F. 2d at 316, 317 (emphasis added). On remand, the district court held (Add. 9a-11a):

that there was ample basis for the determination of the Secretary that Norwalk did have "a comprehensive plan" and that the "package" which was in the record before him adequately disclosed it.

* * * *

^{7/} Thus they contend that they had "the right to trial on the issues of whether the requisite comprehensive plan did exist before the Secretary's decision, whether the purported comprehensive plan was sufficiently brought to the attention of Secretary Romney, and ultimately whether sufficient evidence existed to show that Secretary Romney could have reasonably found that the conversion-substitution was in accordance with the comprehensive plan" (Appellants' Brief at 13).

Appellants have neither suggested that any criterion which ought to have been considered by the Secretary was omitted, nor controverted the application of any of those which were before the Secretary. Since there is no issue of material fact in dispute, I find that in approving the City of Norwalk's application for conversion of the open-space land which is the subject matter of this action the Secretary had ample evidence that the conversion was in accord with Norwalk's comprehensive plan, which plan met the criteria established by the Secretary.

That holding is correct. The facts set forth in the Levine affidavits and attached exhibits conclusively show that a comprehensive plan meeting the requirements of 42 U.S.C. 1500c did exist, and that the HUD staff made a detailed study of that plan before Norwalk's application was approved by the Secretary.

The affidavits and exhibits clarified HUD's comprehensive planning requirements, and explained that those requirements could be met by a continuing planning program rather than by a fixed and single document (Add. 3a; Levine Affidavit, paragraphs 3 and 4).

That such a planning program did in fact exist was evident from the planning documents HUD's staff reviewed. It was clear from such documents as "A Review of Park Planning 1952-1966", which set the City's policy that parks designed for passive as well as for active use should be situated near school sites or areas of public ownership (Add. 6a; Exhibit C to Levine Affidavit). It was clear as well from the City's Master Plan of Parks

which had already adopted the proposed conversion (Add. 6a; Exhibit D to Levine Affidavit; Levine Affidavit, paragraph 8; Levine Supplemental Affidavit, paragraph 4). The City's planning for open-space development was also reflected in its Master Plan of Transportation and Capital Budget (Exhibits I and II to Levine Affidavit). And the City's planning for open space was consistent with regional policy as well (Add. 7a; Levine Affidavit, paragraph 8).

Approval of Norwalk's application was sensible. The Taylor Farm would serve the recreation needs of lower income families residing in adjacent neighborhoods; it is surrounded by complementary uses: neighborhood parks to the north and northwest, a private golf course to the east, and public beaches to the south (Levine Affidavit, paragraph 8). The conversion is consistent with three fundamental goals of the areawide plan: (1) to provide open space close to older, high-density neighborhoods; (2) to develop public beach facilities for the region; and (3) to preserve large areas of open-space land north of Merritt Parkway. The in-migration of minority families into the South Western Regional Planning area and the

scarcity of open-space land in the older areas of the cities contribute to making the Taylor Farm an ideal site; the addition of beach front back-up areas permits the Norwalk beach parks to serve the regional demand for such parks; and the remaining portion of the Gallaher Estate is large enough to support the passive and active recreation uses which regional planners seek to preserve in the area north of the Merritt Parkway (Add. 6a-7a; Levine Affidavit, paragraph 8).

These considerations were adequately disclosed in the conversion package submitted to the Secretary. The Regional Office staff presented its findings and conclusions reached on each of the four determinations required by 42 U.S.C. 1500c in the June 27, 1969 Memorandum from William J. Davis to Arthur A. Davis (Doc. 11). Mr. Levine had participated in the drafting of this Memorandum (Levine Affidavit, paragraph 12, Answers to Interrogatories 1(g), Doc. 64). Enclosed with the Memorandum was supporting documentation including, among other things, Mayor Zullo's letter of January 22, 1968, the Batstone January 6, 1969 Memorandum, the June 4, 1969 letter from the South Western Regional Planning Agency endorsing the conversion, and the site study of the Norwalk Community College prepared by the City

Planning Commission (Doc. 11). The Davis Memorandum summarized the findings of the Regional Office Planning Division on the degree to which the conversion was necessary to the orderly development and growth of Norwalk; the relative usefulness of the two sites; and the degree to which "the conversion is in accord with the development policies which are a part of Norwalk comprehensive planning". In concluding that the conversion satisfied the statutory standards, the Memorandum cites the following findings: the Community College site is small enough to have a minimal impact on the open space activities programmed for the Gallaher Estate, the Estate remains large enough to accommodate the uses originally programmed, and the Taylor Farm serves local and regional needs for publicly-owned beaches (Ibid.).

Nothing more was required. The Secretary need not himself have examined the documents constituting the comprehensive plan, but was entitled to rely upon the summaries and recommendations of his subordinates, so long as they "inspected and were thoroughly familiar with, whatever documents" comprised the comprehensive plan. Schicke v. Romney, supra, 474 F. 2d at 316. See also Braniff Airways, Inc. v. CAB, 379 F. 2d 453, 461 (C.A.D.C. 1967). As this Court recently stated, it is only in the most extreme of circumstances (not present here)

that a reviewing court will inquire "into the relative participation of the Secretary and his associates". National Nutritional Foods Ass'n v. F.D.A., 491 F. 2d 1141, 1145, (C.A. 2, 1974). See also, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); United States v. Morgan, 313 U.S. 409, 422 (1941) (Morgan IV); Morgan v. United States, 304 U.S. 1, 18 (1938) (Morgan II). ^{8/}

^{8/} Thus, the district court did not abuse its discretion in failing to order that Secretary Romney be deposed (Appellants' Brief at 19-23). Where, as here, a reviewing court decides that amplification of a record is necessary, it is in the sound discretion of the district court to "consider which method of amplification will prove the most expeditious so that full review may be had as soon as possible". Citizens to Preserve Overton Park v. Volpe, *supra*, 401 U.S. at 420-421. See also Camp v. Pitts, 411 U.S. 138, 143 (1973); Schicke v. Romney, *supra*, 474 F. 2d at 319. The district court here acted well within its discretion in limiting the scope of discovery. As noted previously, the federal defendants answered interrogatories propounded by the plaintiffs (Doc. 64). Moreover, the federal defendants do not claim that Secretary Romney personally inspected any of the documents which comprise the comprehensive plan (see Answers to Interrogatories 1(c), Doc. 64). The only issue of fact before the district court was whether the Secretary "or a member of the department" made a detailed study of the comprehensive plan. As discussed herein, the affidavits of Bernard Levine and the answers to the interrogatories plainly show that such a study was conducted by the HUD Regional staff. Deposing Secretary Romney, therefore, would have been both unnecessary and irrelevant.

Indeed, the Supreme Court has specifically recognized the propriety of affidavits as a means of explaining agency action: "If * * * there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a de novo hearing but, as contemplated by Overton Park, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary". Camp v. Pitts, *supra*, 411 U.S. at 143 (emphasis added).

The Levine affidavits demonstrate that employees of HUD did conduct a detailed, independent review of the planning documents which formed the basis of findings and recommendations which were communicated to the Secretary and upon which he based his determination that the substitution-conversion was in accord with the applicable comprehensive plan for the City of Norwalk. Accordingly, since it is clear that there has been compliance with the mandate of this Court that "the Secretary or members of his department must have inspected, and been thoroughly familiar with, the contents of * * * the locality's comprehensive plan" (Schicke v. Romney, supra, 474 F. 2d at 316), the decision of the district court, upholding the Secretary's decision should be affirmed and the City should be allowed to proceed with the contemplated conversion so that permanent facilities for its Community College can be constructed on the site which the City Planning Commission selected more than eight years ago (see Site Study for Norwalk Community College, Doc. 11). 9/

9/ Appellants' contention that the district court erred in entering summary judgment for all defendants on the ground that only Secretary Romney moved for summary judgment (Appellants' Brief at 22-23) is totally frivolous. In the first place, defendants' summary judgment motion was filed on behalf of both federal defendants (Doc. 69). Furthermore, it is settled that when a party has moved for summary judgment, a cross motion by an opponent is a mere formality and the district court has the power to grant summary judgment for a non-moving party. See, e.g., Local 453, International Union of Electrical, Radio & Machine Workers v. Otis Elevator Co., 314 F. 2d 25 (C.A. 2, 1963); Local 33, International Hod Carriers Building & Common Laborers' Union of America v. Mason Tenders District Council of Greater New York, 291 F. 2d 496 (C.A. 2, 1961); 6 Moore, Federal Practice, §56.12 (1974 ed.) and cases cited therein.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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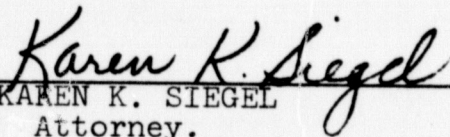
SEPTEMBER, 1974

CERTIFICATE OF SERVICE

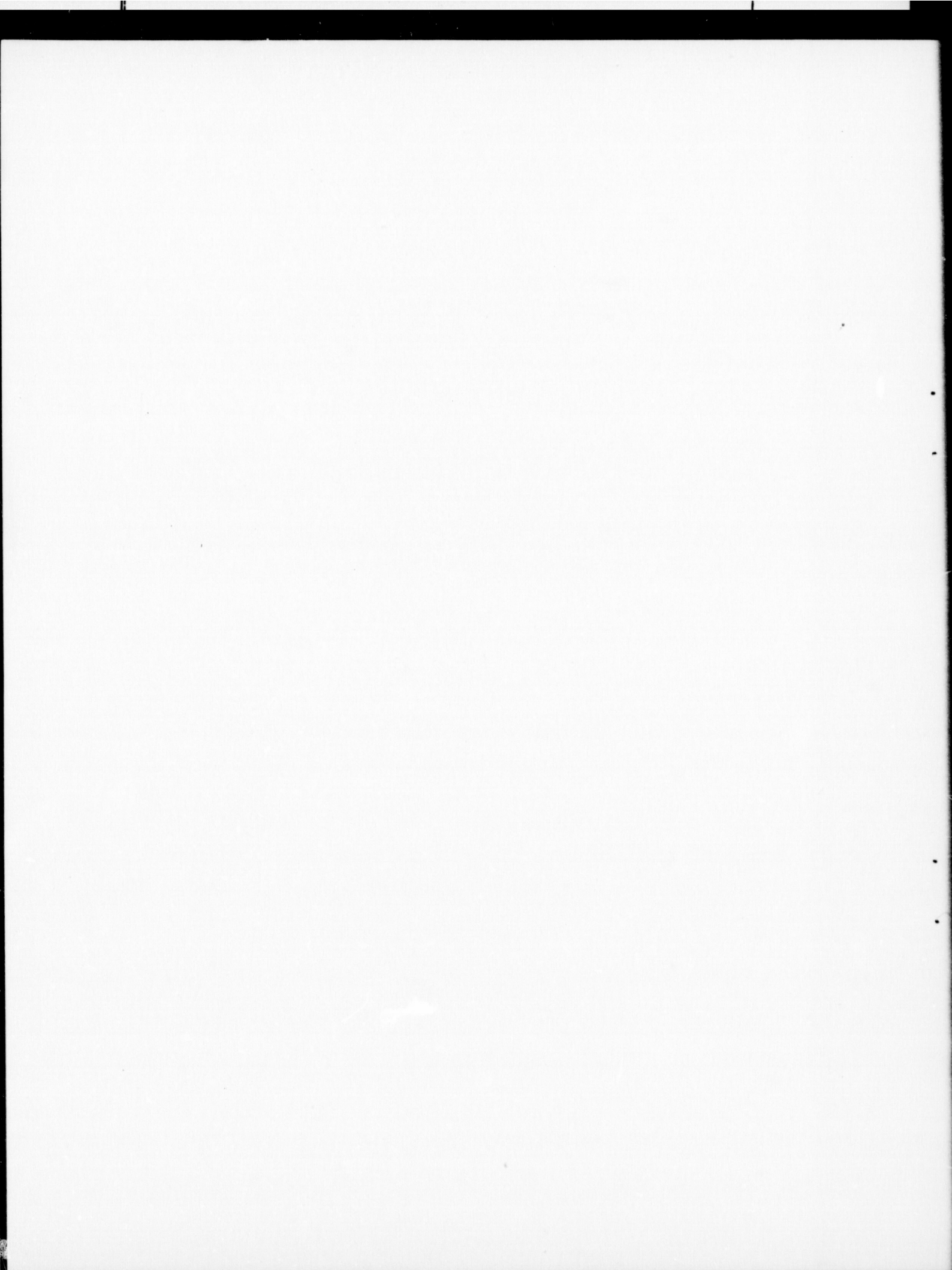
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A D D E N D U M



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U.S. DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHARLES A. SCHICKE, ET AL

v.

CIVIL NO. B-169

JAMES T. LYNN, SECRETARY OF
HOUSING AND URBAN DEVELOPMENT,
GEORGE ROMNEY and THE CITY OF
NORWALK

MEMORANDUM OF DECISION

At an earlier stage in this litigation the Court upheld the determination of Secretary Romney approving the withdrawal of certain land acquired by the City of Norwalk under the Open Space Land Program for use as a park and its conveyance to the State of Connecticut for use as a site for a community or regional college. 42 U.S.C. §§.1500-1500e. See Schicke v. United States, 346 F.Supp. 417 (D. Conn. 1972). On appeal from that order granting summary judgment in behalf of the Secretary, the Court of Appeals held that the administrative record before the Secretary at the time he made his determination was deficient in that it did not establish that the conversion was in accord with the then applicable comprehensive plan for the area.^{1/} Schicke v. Romney, 474 F.2d 309 (2d Cir.

1/

As amended in 1970, 42 U.S.C. § 1500c provides:

"No open-space land for the acquisition of which a grant has been made under section 1500a of this title shall be converted to uses not originally approved by the Secretary without his prior approval. Prior approval will be

1973). Circuit Judge Lumbard, writing for the Court of Appeals, noted that the record before the Secretary

"leaves in doubt whether the regional staff itself ever saw anything in the nature of a comprehensive plan or whether they merely relied on statements by local officials. Furthermore, the remainder of the administrative record is silent on this matter. Nowhere in the documents submitted to the district court is there a copy of any comprehensive plan, a statement of what the plan contains, or a reference to where it is to be found.

At oral argument we asked counsel for appellees what the plan consisted of and they were unable to inform us. It was only in a supplemental memorandum submitted by the City of Norwalk, dated December 12, 1972, that the first faint glimmer of light was shed on this matter. It appears that a single comprehensive plan for Norwalk does not exist, but that there are a series of master plans, such as the Master Plan of Parks, of Schools, of Transportation, as well as subdivision regulations and zoning regulations. Thus there is some question about whether these documents constitute a 'comprehensive plan' which meets the statutory criteria. Of course, without the plan itself and the Secretary's detailed findings with respect to it, this court is in no position to decide this issue." 474 F.2d at 317.

On remand the defendant has submitted two affidavits of Mr. Bernard I. Levine of HUD, and attached exhibits, which

1/ continued

granted only upon satisfactory compliance with regulations established by the Secretary. Such regulations shall require findings that (1) there is adequate assurance of the substitution of other open-space land of as nearly as feasible equivalent usefulness, location, and fair market value at the time of the conversion; (2) the conversion and substitution are needed for orderly growth and development; and (3) the proposed uses of the converted and substituted land are in accord with the then applicable comprehensive plan for the urban area, meeting criteria established by the Secretary."

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JUL 27 10 12 AM '71
U.S. DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES DISTRICT COURT
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1973). Circuit Judge Lumbard, writing for the Court of Appeals, noted that the record before the Secretary

"leaves in doubt whether the regional staff itself ever saw anything in the nature of a comprehensive plan or whether they merely relied on statements by local officials. Furthermore, the remainder of the administrative record is silent on this matter. Nowhere in the documents submitted to the district court is there a copy of any comprehensive plan, a statement of what the plan contains, or a reference to where it is to be found.

At oral argument we asked counsel for appellees what the plan consisted of and they were unable to inform us. It was only in a supplemental memorandum submitted by the City of Norwalk, dated December 12, 1972, that the first faint glimmer of light was shed on this matter. It appears that a single comprehensive plan for Norwalk does not exist, but that there are a series of master plans, such as the Master Plan of Parks, of Schools, of Transportation, as well as subdivision regulations and zoning regulations. Thus there is some question about whether these documents constitute a 'comprehensive plan' which meets the statutory criteria. Of course, without the plan itself and the Secretary's detailed findings with respect to it, this court is in no position to decide this issue." 474 F.2d at 317.

On remand the defendant has submitted two affidavits of Mr. Bernard I. Levine of HUD, and attached exhibits, which

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granted only upon satisfactory compliance with regulations established by the Secretary. Such regulations shall require findings that (1) there is adequate assurance of the substitution of other open-space land of as nearly as feasible equivalent usefulness, location, and fair market value at the time of the conversion; (2) the conversion and substitution are needed for orderly growth and development; and (3) the proposed uses of the converted and substituted land are in accord with the then applicable comprehensive plan for the urban area, meeting criteria established by the Secretary."

remedy the deficiency noted by the Court of Appeals. A comprehensive plan contained in a single document, so entitled, which could be reviewed and approved once, is not required by the Department as a prerequisite either for new applications for open-space grant assistance or for later conversion of any part of such acquired property. Rather, the requirement that a program of area-wide comprehensive planning be underway in the urban area in which the property is located contemplates a continuing process of action undertaken by the municipality to regulate and manage land uses consistent with the acquisition and development of open-space needs in the entire area. See Departmental Letter No. OS-12.^{2/}

In the fall of 1967 the City of Norwalk was considering a proposal to incorporate into its program for the development and use of parks a proposal for the conversion of some open-space land which would involve the surrender of a portion of the Gallaher Estate for use as a community college and the substitution of the Taylor Farm for the surrendered parcel. In September 1967, the City submitted an application for open-space assistance to purchase the Taylor Farm containing a location map labeled "Master Plan of Parks" which indicated that the City had revised its Master Plan of Parks to incorporate the designation of the Taylor Farm as a proposed park site.

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This departmental letter was issued primarily to set planning standards for new applications for open-space grant assistance and served also as the basis for the review of proposed conversions of open-space land.

Since this was the first major request for a conversion presented to HUD, the application was given special consideration. Mr. Bernard I. Levine of the New York Regional Office of HUD, with members of the Regional Office Metropolitan Development and Planning staff, was called to the HUD Central Office to review the preliminary findings with regard to the statutory prerequisites for conversion and to advise whether approval of the Norwalk proposal would set a sound precedent consistent with the spirit of the Act.

On July 24, 1968, Mr. Levine, the Regional Assistant Director of Planning, accompanied William Davis, Assistant Regional Administrator for Metropolitan Development, to Norwalk to perform a preliminary review of the conversion-substitution proposal. During that visit they met with city officials, including Mayor Zullo, to determine the purposes of the proposal and to evaluate it in the context of the needs and goals of the community. They conducted a site evaluation in which they inspected the two sites to determine their relative desirability for open-space purposes and to assess the impact of the conversion on the remaining portion of the Gallaher Estate. They toured the adjoining neighborhoods to determine the relative proximity of the parcels to areas of high density population, the relative accessibility of each site, and the existence of complimentary adjoining land uses.

For the purposes of determining whether the proposed conversion-substitution was consistent with the local comprehensive planning activities of the City, they reviewed copies

of planning documents on file in the Regional Office.

The City of Norwalk had submitted with its application for recertification of its Workable Program its planning documents for review by the Regional Office Planning Division. Of these documents on file in the Regional Office, several were relevant to the determination of whether the conversion was consistent with the City comprehensive planning program. Specifically they include: "A Review of Park Planning 1952-1966;" the Proposed Master Plan Development for Norwalk, adopted by the City Planning Commission and Common Council in April 1962; the Master Plan of Transportation adopted by the Planning Commission in April 1966; and the Capital Budget of the City of Norwalk 1967-1968. Pursuant to a request for recertification of its Workable Program received in March of 1967, the City had previously submitted a document entitled "A Review of Park Planning 1952-1966" which described the past and present park plans and served as a guide to future proposals concerning the City's park system. HUD also had obtained a Building Zone Map which reflected the proposed land uses of Norwalk.

In order to expand and update his familiarity with the local planning program, Levine, accompanied by Constantine Vlatos, a Regional Office urban planner, again traveled to Norwalk on April 7, 1969. During this visit they questioned Mr. Joseph Tamsky, the Director of the Norwalk City Planning Commission, concerning the City's open-space program, and

the manner in which it and the proposed conversion would serve the open-space needs of the community and the goals of the local and area-wide comprehensive plans. They were provided access to and conducted a detailed review of the City's planning documents, including the then current Master Plan of Parks and thoroughfare and land use plans.

This thorough review of the planning documents, the site inspection, and his general familiarity with the South Western Regional Planning Agency's ^{3/} program and planning policies led Levine to conclude that the conversion-substitution was in accord with the applicable comprehensive plans.

Specifically, the City's Planning Commission had incorporated the proposed conversion into its Master Plan of Parks. The location map as so revised was reviewed by Mr. Levine and Mr. Vlatos in late 1968 and during their visit to Norwalk in April 1969. An operative policy of the open-space planning process in Norwalk, as described in the Review of Park Planning, was to locate parks designed for passive as well as for active use near school sites or areas of public ownership. The location of a community college adjacent to the remaining portion of the Gallaher Estate was therefore not inconsistent with this policy. The conversion-substitution would leave both the beach parks and the Gallaher Estate

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A regional multi-jurisdictional agency concerned with coordinating development within eight adjoining towns in the lower half of Fairfield County.

within the specifications set by the City for "community" parks. The Taylor Farm would serve the recreation needs of the lower income families residing in adjacent neighborhoods. The site was surrounded by complementary land uses: neighborhood parks to the north and northwest, a private golf course to the east, and the public beaches to the south.

Moreover, the conversion was consistent with what was understood to be three fundamental goals of the area-wide plan: (1) to provide open space close to older, high-density neighborhoods; (2) to develop public beach facilities for the region; and (3) to preserve large areas of open space north of the Merritt Parkway. The in-migration of minority families into the South Western Regional Planning area and the scarcity of open-space land in the older areas of the cities contributed to making the Taylor Farm an ideal site. The addition of beach front back-up areas would permit the Norwalk beach parks to serve the regional demand for such parks. Finally, the remaining portion of the Gallaher Estate was large enough to support the passive and active recreation uses which regional planners sought to preserve in the area north of the Merritt Parkway where it is located.

To supplement Mr. Levine's preliminary determination that the conversion was consistent with applicable plans the City was required to obtain formal approval from the South Western Regional Planning Agency. This agency in 1967 had

prepared a plan of development covering the towns of Greenwich, Stamford, Darien, Norwalk, Westport, New Canaan, Wilton and Weston. During this period regional planning agencies in Connecticut served as a clearing house for review of development proposals by local communities, and the endorsement of this proposal by the South Western Regional Planning Agency was not a mere inconsequential formality. The HUD Regional Office report recommending approval of the conversion-substitution dated June 27, 1969, which summarized Mr. Levine's reasons for concluding that the conversion-substitution was consistent with applicable comprehensive plans was before the Secretary as part of a conversion "package"^{4/} and was cited in and attached to his determination dated January 11, 1972.

While it might have been possible to superimpose a map of the Master Plan of Parks upon a Zoning Map, and a map of the thoroughfare system, and a color code to identify various densities of population, schools, industrial and residential areas to obtain a composite which would disclose that Norwalk had committed itself to a program which provided an open-space element, and to label the composite as Norwalk's Comprehensive Plan for Land Use and Development, such a single document in itself would not necessarily disclose future short-range or

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This contained a report from the Regional Office staff, supporting documentation, and recommendations suitable for the Secretary's consideration.

long-range open-space programming. Nevertheless, these seven documents are relevant to the determination of whether the conversion was consistent with a City comprehensive planning program. As Letter OS-12 itself states regarding whether an open-space proposal is consistent with area-wide and local planning:

"At a minimum, one of the following conditions relating to the proposed project must be met:

1. Short-range open-space programming must have progressed to the point where it can serve as a basis for determining that the proposed project is consistent with it, or
2. The proposed project is urgently needed and can reasonably be expected to be consistent with the program."

Thus the consistency with which the proposed project fits into everything else Norwalk has done to regulate land use within its boundaries is itself evidence of a program or plan. On this basis the detailed, in-depth study by members of HUD of all the steps taken by the City of Norwalk with respect to this open-space conversion, viewed in conjunction with those documents setting forth the various permitted uses of land in Norwalk, establishes the existence of a Norwalk comprehensive plan.

In view of the foregoing, I am of the opinion that there was ample basis for the determination of the Secretary that Norwalk did have a "comprehensive plan" and that the "package" which was in the record before him adequately disclosed it. The affidavit of Mr. Levine resolves adversely to

plaintiffs all doubts "whether the regional staff itself ever saw anything in the nature of a comprehensive plan or whether they merely relied on statements by local officials." Schick v. Remney, supra, 474 F.2d at 317.

Had all of the foregoing additional underlying facts now disclosed in the affidavits of Mr. Levine in support of this renewed motion for summary judgment been divulged to the Court of Appeals in answer to that Court's inquiry, the additional consideration of this matter on remand would not have been necessary. It is clear that members of HUD made a detailed study of all the factors relevant to a consideration of whether the proposed conversion would be in accord with a comprehensive plan. The several plans reflect every way in which land within the boundaries of the City of Norwalk is used or may be used. Taken together, they constitute a "comprehensive plan for the urban area, meeting criteria established by the Secretary." § 1500c as amended in 1970.

Mr. Levine's affidavits have not been challenged in any respect by plaintiffs, who have neither suggested that any criterion which ought to have been considered by the Secretary was omitted, nor controverted the application of any of those which were before the Secretary. Since there is no issue of material fact in dispute, I find that in approving the City of Norwalk's application for conversion of the open-space land which is the subject matter of this action the Secretary had before him ample evidence that the conversion was in accord

with Norwalk's comprehensive plan, which plan met the criteria established by the Secretary.

Enter Judgment for the defendants.

4 SO ORDERED.

Dated at Hartford, Connecticut, this 26th day of March, 1974.

M. Joseph Blumenfeld
M. Joseph Blumenfeld
United States District Judge